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No. 84-1392

In the Supreme Court of the United States

OCTOBER TERM, 1984

KENNETH R. GEORGE and ALBERTA W. GEORGE,
Petitioners,

vs.

LIBERTY NATIONAL BANK AND TRUST COMPANY OF LOUISVILLE (formerly doing business as United Kentucky Bank, Inc.), UNITED KENTUCKY, INC. and DOES 1-99,
Respondents.

REPLY OF PETITIONERS TO OPPOSITION BRIEF OF RESPONDENT, LIBERTY NATIONAL BANK AND TRUST COMPANY OF LOUISVILLE

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PRELIMINARY STATEMENT

It is first necessary to take note of what was not filed. That is, though the petition and all of the proceedings below, including the complaint in the district court, the judgment of dismissal by the district court and the Sixth Circuit decision, named, as parties defendant in the district court, as appellees in the Sixth Circuit

and as respondents in the instant proceedings, United Kentucky, Inc. and DOES 1-99, neither filed any opposition to the instant petition. There is no doubt that the district court dismissed the complaint as to United Kentucky, Inc. and DOES 1-99. (Pet. App. pp. A7-A19) The district court cites no reason for the dismissal different from the reasons for its dismissal against United Kentucky Bank, Inc.; in fact, the district court memorandum decision often referred to UKB simply as "the Bank." But, the judgment of dismissal used the following words found in Petition Appendix at A20:

> IT IS FURTHER ORDERED AND ADJUDGED that *defendants'* Motion to Dismiss be and the same hereby is sustained. (Emphasis added)

The thing which makes this such an important fact is that neither respondent, United Kentucky, Inc. nor respondent, DOES 1-99, were parties to any of the state court proceedings. In the petition (Pet. Et. pp. 7, 27), petitioner brought to this Court's attention the facts that the district court had dismissed and the Sixth Circuit affirmed the dismissal of the complaint against United Kentucky, Inc. and DOES 1-99.

This preliminary statement is included simply to remind the Court that the opposition brief which has been filed is not filed for or on behalf of respondents, United Kentucky, Inc. or DOES 1-99. Quite frankly, it is literally impossible on any basis to justify the dismissal of the complaint against these respondents. Not filing a brief in opposition quite likely was strategically decided in an attempt to avoid calling attention to these latter two respondents and hoping this Court would overlook their existence and assume there to be only one respondent, i.e., United Kentucky Bank, Inc. (hereinafter "UKB.")

ERRONEOUS ASSERTIONS IN BRIEF IN OPPOSITION FILED BY UKB

On page 11 of the UKB brief in opposition, it is stated that petitioners raise a question as to whether the doctrine of collateral estoppel can bar subsequent litigation of an "exclusively federal claim." Collateral estoppel never bars a "claim."[1]

The federal/state dichotomy is a total irrelevancy when discussing what collateral estoppel does or does not bar, and petitioners have never claimed otherwise. Collateral estoppel bars relitigation of already actually litigated historical facts, nothing more and nothing less. If parties to a subsequent suit have previously taken advantage of an opportunity to fully and fairly litigate to *resolution* a fact of ultimate significance to the prior proceedings, it is irrelevant whether or not that fact was litigated in a state court, or a federal court. To the knowledge of petitioners, there is no such thing as a fact which is "exclusively federal." On the same page 11, UKB erroneously contends that petitioners raised a question as to whether a fact previously determined in a summary judgment proceeding can be given collateral estoppel effect in a subsequent proceeding. Nothing could be further from anything contended by petitioners. The

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1. Throughout its brief, UKB shows a confusion which probably causes some of the error in its positions. That is, there is continual misuse of the word "claim" and the phrase "cause of action." These are sometimes used synonymously and, at various times, used with varying definition. A "claim" is an element of a "cause of action" but it is a confusing misstatement to refer to a "cause of action," as a "claim." This is an exceedingly important distinction when the subject at hand is res judicata.

actual position of petitioners is stated in the first new paragraph on page 10 of the petition.

In its brief, UKB shows no indication of any understanding concerning the importance of the ultimate fact requirement. Even a full and fair prior adjudication of a fact of only mediate significance to the proceeding in which it was adjudicated is not barred from relitigation in a subsequent proceeding.

UKB, though never clearly stating it, premises all of its contentions regarding collateral estoppel on an obvious underlying belief that collateral estoppel, like res judicata, has preclusive effect on relitigation of all facts, both ultimate and mediate, previously litigated or which "could have been" previously litigated in a prior proceeding. These propositions are the antithesis of the law.

Also on page 11 of the UKB brief, it is suggested that petitioners contend that "it" [the doctrine of collateral estoppel] cannot be employed to bar a subsequent adjudication in federal court of "fraudulent intent" because the fraudulent intent dealt with in state court was that necessary to establish common law fraud and the "fraudulent intent" to be adjudicated in federal court was that necessary to establish statutory mail fraud. This again is a misstatement which, probably, is based on misperception by UKB.

There is no question that "it" [the doctrine of collateral estoppel] may be employed to bar relitigation of any historical fact of ultimate significance to the proceeding in which it is resolved adjudicated after a full and fair hearing. Petitioners contend that statutory mail fraud, including the specific intent necessary to commit mail fraud, was neither a fact of ultimate significance in the state court proceeding nor was there even any opportunity or attempt

in the state court to litigate such facts. The district court wrote as follows in its memorandum opinion included in Pet. App. B pp. A17-A18:

> Third, Judge Revell's finding that there was no 'fraud' in the UKB's actions is sufficient to act as collateral estoppel to fraud in a RICO action.
>
> Under Kentucky law, 'fraud' consists of the elements of (1) a material misrepresentation, (2) which is false, (3) known to be false or made recklessly, (4) made with inducement to be acted upon, (5) acted in reliance thereon, and (6) causing injury. (citations omitted) Specific intent to deceive, i.e., 'scienter' is a required element. (citations omitted)
>
> [S]pecific intent is also a required element of this [statutory mail fraud] offense. . . . [I]n this case, Judge Revell found no specific intent to defraud . . . Therefore, Judge Revell's finding operates as a bar to any further action on the RICO claim.

The first three elements of fraud under Kentucky law deal with the necessity of a *representation known to be false*, and the second three deal with the purpose for the false misrepresentation and the *success of the defrauder in causing reliance* on the misrepresentation by the victim and *injury* to the victim.

Comparing the "specific intent to defraud" necessary under Kentucky law with the "specific intent to defraud" necessary under the mail fraud statute, quite literally, is like an attempt to compare apples with oranges. A complete violation of the mail fraud statute can be accomplished without any misrepresentation. Since no misrepresentation is required, it is nonsense to suggest the necessity of reliance. And, quite importantly, there need be no in-

jury suffered by anyone in order to defraud under the mail fraud statute.

The question is: Specific intent to do what? When used in reference to mail fraud, the word "defraud" means something substantially different than what is meant when the word "defraud" is used with reference to the Kentucky law of fraud.

In addition to the authorities cited in the petition, perhaps the following analysis of time-tested case authorities, shortened only by space limitations, will be helpful. *Epstein v. United States*, 174 F.2d 754 (6th Cir. 1949) says at 766:

> [That] the . . . crime of using the mails to defraud is not limited to what would give rise to a common-law action for deceit means . . . that *a showing of loss to the victim is not necessary* . . . . (Emphasis added)

The Third Circuit has most recently surveyed and clarified the applicable law. First, in *United States v. Frankel*, 721 F.2d 717 (3rd Cir. 1983) at 917:

> We caution that the mail fraud statute may be violated even in the absence of active misrepresentations.

Continuing at 919:

> [D]ictum in our earlier case of *United States v. Pearlstein*, . . ., underlies the prosecution's difficulty.
>
> *Pearlstein* . . . said that '[t]he scheme need not be fraudulent on its face . . . but must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension.' (citation omitted)
>
> *Pearlstein*, however, should not be read so narrowly. . . . The basic question presented here, which was

> not at issue in *Pearlstein*, is . . . [w]hether a fraudulent scheme executed without a misrepresentation is within the scope of this statute.

Continuing at 920:

> We joined those courts of appeals that have not confined the mail fraud statute to schemes aimed at deprivation of money or property. However, the courts that have accepted the notion that a deprivation of intangible rights is within the statute recognize that an active misrepresentation is not necessary. Instead, the prosecution need prove only a recognizable scheme formed with intent to defraud regardless of how that intent manifests itself in execution. (citation omitted) Schemes to defraud come within the scope of the statute even absent a false representation.

More recently, the Third Circuit spoke to the point in *United States v. Clapps*, 732 F.2d 1148 (3rd Cir. 1984) at 1153:

> We reviewed the following decisions of other courts holding that section 1341 encompasses schemes that deprive persons of intangible rights or interests. (citation to eight cases omitted)

Epstein, explicitly held that the test concerning whether conduct amounted to fraud, for purposes of the mail fraud statute, was whether "the transactions were fair and above criticism in every way" amounted to a "fair course of dealing" were "*inherently* dishonest" or "inconsistent with moral uprightness." (Id., 174 F.2d at 768)

In *Epstein* (174 F.2d at 766), this court stated that *Shushan*, 117 F.2d at 115 is the "rule of law." Therefore, the language there is notable as follows at 117 F.2d at 115:

> But there may be a scheme to defraud by other means than express false representations. A scheme . . .

> by corrupting one who acts for another or advises him, would be a scheme to defraud *though no lies were told* . . .

On page 10 of UKB's brief, UKB states that the difference in common law fraud and statutory mail fraud "is hardly a burning question ripe for Supreme Court review." To the contrary, this is a looming question of immense importance and directly relevant to this Court in its disposition of cases currently pending before this Court. *Haroco, Inc. v. American National Bank and Trust Company of Chicago,* 747 F.2d 384 (7th Cir. 1984), *cert. granted,* 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-822); *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 741 F.2d 482 (2d Cir. 1984), *cert. granted,* 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-648); *Bankers Trust Co. v. Rhoades,* 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed,* 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984) (No. 84-657); *Furman v. Cirrito,* 741 F.2d 524 (2d Cir. 1984). Obviously, this Court has decided to resolve the raging dispute concerning the elements of civil RICO. It is impossible to read the conflicting adjudications on civil RICO without having to admit that there is a philosophically resistent contingent of the bench and bar which searches out every argument conceivable to attack the civil RICO statute. The most recent device is to avoid dealing with RICO directly but strike the primary underlying predicate offense, mail fraud. *DeCarlo v. Southland Corporation,* ..... F.2d ....., No. 83-1525 (6th Cir. Dec. 7, 1984). The result is to superimpose common law fraud standards on the mail fraud statute including, primarily, the necessity for misrepresentation and loss to the victim. This would absolutely revolutionize mail fraud principles well-tested and developed in the law for over a century and do away with the "first line of defense" referred to by The Chief Justice in *United States v. Maze,* 414 U.S. 395, 405-406 (1974).

This is the perfect time for this Court to shore up and reestablish the underpinnings of the mail fraud statute to avoid the inevitable disarray in the administration of justice which will follow this Court's disposition of *Haroco, Sedima, Furman,* and *Bankers Trust* if not dealt with now.

Neither of these cases presents for resolution by this Court any issue concerning mail fraud and its distinctiveness when compared with common law fraud. It is rare for this Court to have the opportunity to address this subject in a civil case; if it were addressed by this Court in a criminal case, lower courts disinclined to follow this Court's ruling in a civil RICO case would use the excuse that this Court had not ruled on this issue in a civil case.

Further, this is the perfect case for this Court to address the mail fraud issue. Here, the Sixth Circuit has remanded the case to the district court for a limited trial on common law fraudulent inducement and, if the mails were used, civil RICO based thereon. However, the district court, as quoted above, has already ruled that mail fraud is encumbered with the Kentucky common law elements and, in addition to affirming this ruling (Pet. App. A p. A6), the Sixth Circuit has recently rendered its opinion in *DeCarlo,* supra, which essentially does the same thing. Thus, unless this Court reverses the error, petitioners will be forced to trial on this erroneous standard.

Respectfully submitted,

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